STATE OF CALIFORNIA
Governor
GRAY DAVIS,

DEPARTMENT OF INDUSTRIAL RELATIONS
Office of the Director
455 Golden Gate Avenue, 10th Floor
San Francisco, CA 94102
Tel: (415) 703-5050 Fax: (415) 703-5059/8

MAILING ADDRESS:
P. O. Box 420603
San Francisco, CA 94142-0603

March 1, 2002

VIA FACSIMILE

000030

Emily Stover DeRocco
Assistant Secretary for Employment and Training
U.S. Department of Labor
Washington D.C. 202101
(FAX) 202 693 2808

Dear Assistant Secretary DeRocco,

Thank you for your letter, received in our office during the week of February 10-15, 2002. You asked for an immediate response to be faxed to your office. Your letter was missing an attachment, referred to in the third paragraph of your letter, which we received on February 22, 2002. You offered us a further opportunity to refute complaints or take corrective action, and identified Labor Code sections 1773.1 (annualization of payments) and 3075 (b) (requiring a demonstration of "need" for new programs) as areas of concern that they may "restrict, rather than promote, valuable opportunities for workers . . . ." I believe there is a complete misunderstanding of the import of the annualization issue, and after you have a chance to review our response I expect that you will see that the sections complained of promote opportunities for workers, for non-union programs, and for competition for public works by non-union contractors.

Your concerns on the "need" issue, while subject to some clarification, should be addressed in legislation which we are willing to discuss with you. Rather than focus on refutation of the points you raise, which I believe is possible, it may be more productive to agree on a form of "need" which reflects a balance between protection of apprentices from transient or exploitative programs and a need to facilitate expansion of worthy programs. I have been informed that some form of a "need" test for new or expanded programs has been acceptable to BAT in other states. I would like to meet with you to discuss the range of statutory arrangements which BAT has found meet the test of balancing widening opportunities for programs while guaranteeing that apprentices have assurance of reasonably continuous employment and training.

Need

Some form of a "need" standard has been a part of California's apprenticeship law since the Shelley-Maloney Act was adopted in 1939, and there is much evidence in the legislative history of the Fitzgerald Act that Congress was also concerned with ensuring that apprentices are training for jobs that will actually exist, and that they are not being exploited.

That being said, the Department has had little recent experience with application of the standard, either as it stood or as revised to its current form. That is because the CAC was prohibited by court order from enforcing the need standard during most of the prior

Administration. Under this administration, both before and after the revision of the statute, the CAC has not rejected any programs based on the "need" standard. This is not to minimize the seriousness of your concerns as to the way the standard might be abused, but rather to address the issue of whether action by the Department of Labor is needed urgently. Indeed, the statute provides for the approval of programs which otherwise might not meet the statutory test when "special circumstances" exist. The CAC is still developing the regulations required under the statute to define those "special circumstances."

While discussion of the parameters of a revision are not what you asked for – being neither "refutation" nor "immediate correction" – I would like to meet with you within the next few weeks to explore what statutory options meet our mutual goals.

Annualization

I think you will see the annualization requirement under our statute poses no more problems for Mr. Freeman's clients than the same requirement under federal law. You are correct that my letter to Mr. Freeman of November 13, 2001, while attempting to answer his basic questions about the "annualization" statute, Labor Code 1773.1, did not review each of the exceptions to that statute. The November 13 letter attempted to inform him what we believed the statute required as the basic annualization calculations for apprentice contributions and for journeypersons. My letter also asked Mr. Freeman for his input. It stated: "*if you believe regulations would be necessary, please let us know in what way you believe those regulations would need to differ from existing Davis-Bacon Act rules and regulations.*" The focus of the problems voiced by Mr. Freeman had to do with the basic annualization requirement and that dictated the focus of the response. I am sorry you found my letter unresponsive. Mr. Freeman replied to me on January 10, 2002, further detailing his concerns with two of the exceptions, but not proposing that California's regulations differ from those under Davis-Bacon as to the basic requirement for annualization.

The Department of Labor applies the annualization requirement for purposes of the Davis-Bacon Act for the identical purposes California enacted Labor Code 1773.1—so a contractor can not attribute a disproportionate amount of its costs for health, pension, or other insurance which covers a worker year-round, to the hours the worker spends on public work and under prevailing wage requirements. Mr. Freeman's concerns of bias against non-union programs seemed to be aimed at the same requirement the Department of Labor requires contractors to follow on federally funded public works subject to Davis-Bacon. While he expresses his concern in terms of bias against non-union apprenticeship programs, in fact the annualization requirement applies to any program which provides for higher contribution rates on public works than on private works. We do not understand this to be an essential feature of non-union programs, but rather a choice Mr. Freeman's client program has made. The *exceptions* to annualization in Labor Code section 1773.1(d) – not found in Davis-Bacon – in fact seem to generally benefit non-union contractors who support these non-union programs, for the reasons that follow. These exceptions may be of more importance to non-union contractors because our experience has been union contractors generally make the same benefit payments on all projects, public and private, so annualization is not often required. Thus, none have ever invoked the exceptions. Abolishing the exceptions would only make the playing field for non-union contractors on public works less inviting.

To avoid a future round of letters among you, Mr. Freeman and the Department, and in view of the urgency with which you require the Department to address the issue, let me review how the exceptions[1] appear to the Department to be neutral between union and non-union contractors, and apprenticeship programs. If, after review, you determine that the problem is with the non-union sector's understanding of what the exceptions mean, we will certainly extend to them, as we extended to Mr. Freeman, an invitation to give us drafts or suggestions of regulations.

Under California Labor Code section 1773.1 annualization is required where an employer seeks credit for payments which are higher on public works than on private construction performed by the same employer. We understand this to be essentially the same requirement as the Department of Labor requirement on Davis-Bacon Act projects. California law provides three express exceptions.

The first exception in 1773.1(d) is where:

> (1) The employer has an enforceable obligation to make the higher rate of payments on future private construction performed by the employer.

This addresses the situation in which, for example, a plan, trust or other source of payment "obligation" — including apprenticeship (whether union or nonunion) – increases the "rate" from the employers who are obligated to make payments at the time they begin the public works job. I believe that the legislature believed this was not a situation where the evils addressed in the Miree case, and the DOL Regulations on which the statute was modeled, would occur because the higher payments would continue on the later private work. This exception would also accommodate employers who have made *no* benefit payments in their past private work, but in the course of doing a public work undertake to sign onto a plan – union or non-union.

Without further information from you or Mr. Freeman, it is difficult for us to see how this disfavors non-union contractors. Given there may be some non-union contractors who do not provide fringe benefits, the assurance they will not be subject to annualization appears to benefit the non-union programs by removing a possible disincentive to joining a program.

The second exception is where:

> (2) The higher rate of payments is required by a project labor agreement.

It appears that the legislature may have anticipated problems for non-union contractors associated with their extensive participation in large projects done under Project Labor Agreements (PLAs), in California. Given this situation, a nonunion contractor participating in a

[1] Your letter concluded with the line "Having carefully reviewed the available information, I am concerned that CLC sections 1773.1 (b).... may improperly restrict, rather than promote valuable apprenticeship opportunities for workers—contrary to the letter and spirit of the NAA."

Because the prior references were to section 1773.1 (d), which has the exceptions, I am responding to those. Subsection (b) merely provides a list of what constitute Employer Payments, and this has not been a source of controversy, either in its statutory form, or three decades in the form of regulation.

project labor agreement generally, under the PLA, will contribute to the same pension, health and welfare, or apprenticeship funds, as the union contractors he or she is working beside. Those rates would then be "required by a project labor agreement." Were those rates to be higher than amounts contributed previously on private works, as Mr. Freeman posits in his letter, he is correct no annualization would be required. There are several problems, factual and logical, with analyzing this exception as discrimination against non-union contractors or apprenticeship programs.

Perhaps most importantly, providing this exception would not discriminate against a non-union contractor who wished to keep affiliation with ABC, San Diego's programs to any degree more than application of the Davis-Bacon annualization rule would, as we understand DOL's application of its rules. It seems unlikely that a contractor would chose to enter a PLA because of the difference in training fund rates, whether annualized or not. We know of no PLA's which set the rate of payment for apprenticeship for the crafts trained by ABC, San Diego higher than the $1 per hour (on public works) offered by Mr. Freeman. This exception assures annualization will not apply to the full range of benefits – health, pension, etc. As a general exception it facilitates the participation of non-union contractors in jobs under project labor agreements on a level playing field with union contractors by making clear, if a higher rate is required under the PLA, the non-union contractor would not be subject to annualization. Again, as we understand it, if this exception for a PLA did not exist the basic annualization requirement would have the same impact on the contributions to Mr. Freeman's non-union apprenticeship program.

Without more information from your office, or Mr. Freeman, we cannot see how this exception favors union contractors as a group, disfavors non-union contractors, or disfavors non-union apprenticeship programs in any way different from DOL annualization regulations.

The third exception is as follows:

> (3) The payments are made to the California Apprenticeship Council pursuant to Section 1777.5.

The option for a contractor to receive credit against the prevailing wage obligation by making payments to the California Apprenticeship Council, which the CAC then grants to support all apprenticeship (union and non-union), is an option available in California since 1977, so it is hardly aimed at recent non-union programs, much less the contractors associated with them. It is an accommodation largely used by non-union contractors, who wish to do prevailing wage work, but elect not to commit to an apprenticeship program (union or non-union.). As such, the contribution option (in Labor Code 1777.5) does not favor union contractors, or their affiliated apprenticeship programs. It does level the playing field for non-union contractors, doing public works, who are reluctant to contribute to union-affiliated programs.

The level of the payments, which can be made to the CAC, is set at that which prevails for this craft and this area-- and so, for the majority of programs, whether non-union or union, the contractors involved would have no economic incentive to make these payments to the CAC rather than to a program. Moreover, these payments are generally bona fide fringe benefit payments which are taken as a credit against the prevailing wage even when the contribution exceeds the prevailing training fund contribution rate. An incentive to pay the lower rate to the CAC would exist only where the amount set by a specific non-union program for public works

was far higher than set by other programs in the same trade in the same geographic area and which have been found to be prevailing. Setting the higher rate for public works, of course is a program decision rather than California's. The situation of having a far higher rate only on public works is one in which the Davis-Bacon regulations would, as we understand them, also require annualization.

The exception, thus, simply makes clear that a contractor who chooses to pay training contributions to the CAC may take full credit for those contributions. Without resolving the question of whether annualization of payments to the CAC would have been required in any case, this exception recognizes a device which levels the playing field on public works between contractors participating in apprenticeship and those who do not. In addition, however, the ability to elect the CAC to receive contributions, coupled with the recognition of those contributions under the annualization statute, is a device to *expand* apprenticeship opportunities because the CAC ultimately grants those monies to all registered apprenticeship programs doing the training. Labor Code section 1777.5 is referred to in the text of the annualization exception. At subsection (m) that statute provides that the CAC's training contributions are collected, and then reallocated to training programs in the area. In the case of San Diego ABC, funds would be received on the same basis as union programs under the provisions of 1777.5(m)(2). Thus, even in the situation where some contractor found an incentive to not contribute to ABC, but to the CAC, the proportional share of those funds ABC of San Diego would otherwise enjoy would come back to them. The redistribution mechanism, because it is measured by numbers of apprentices rather than contribution rates on public or private works, rewards programs which train a higher number of apprentices.

Without further information from your office, or Mr. Freeman, we cannot see how this systematically treats nonunion contractors in a way less favorable from union contractors, or disfavors non-union apprenticeship programs. I believe this refutes the complaints, and shows that the exceptions serve the policy your letter refers to, of assuring a level playing field.

I look forward to hearing from your office as to as early a meeting date as convenient to you.

Sincerely,

Stephen J. Smith

Stephen J. Smith
Director